No. 15103.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN IRWIN ROBERTS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

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Statement of Jurisdiction.

Appellant was indicted by the Grand Jury for the Southern District of California on October 12, 1955, on two counts of perjury and one count of obstruction of justice [Clk. Tr. 11].[1]

On October 25, 1955, appellant was arraigned and entered a plea of not guilty to all three counts of the indictment and the case was set for trial on January 10, 1956 [Clk. Tr. 12].

On January 10, 1956, jury trial was begun in the United States District Court for the Southern District of California, the Honorable Judge Ben Harrison presiding [R. 3].[2] The trial was concluded by a verdict of guilty on all three counts on January 13, 1956 [R. 481].

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[1]"Clks. T." refers to Clerk's Transcript of Record.

[2]"R" refers to Reporter's Transcript.

On January 30, 1956, it was adjudged that appellant be committed to the custody of the Attorney General for a period of three years on each of the three counts, the sentences to run concurrently [R. 499; Clk. Tr. 43-44].

On February 2, 1956, a timely notice of appeal was filed [Clk. Tr. 47], and on February 8, 1956, the District Court ordered that the appellant be allowed to proceed *in forma pauperis* [Clk. Tr. 50].

The District Court had jurisdiction of this cause of action under Title 18, United States Code, Sections 1503, 1621 and 3231.

This Court has jurisdiction under the provisions of Title 28, United States Code, Section 1291 and Rules 37 and 39 of the Federal Rules of Criminal Procedure, Title 18, United States Code.

Statement of Facts.

Appellant was hired by Builders Control Service, Inc. in June, 1948 to liquidate certain property of the corporation in San Diego County [R. 49, 52]. His starting salary was $300 per month, but this was later raised to $400 [R. 49]. No written contract was entered into and no compensation in addition to his salary was given or promised him [R. 49]. The appellant was fired from his position in March, 1951 [R. 49]. On May 23, 1952, he filed a civil action against the corporation and others alleging that they were indebted to him in the sum of $477,805.00 for services rendered by him pursuant to a written contract [R. 78, 81]. The written contract was alleged to have been taken from him by fraud, etc. [R. 76].

Various depositions were taken in the civil action, and the cause went to trial in October, 1954, the case

ultimately being dismissed for lack of prosecution [R. 7-8, 452]. Various statements of the appellant under oath during the depositions and at the time of trial were the bases of the grand jury's indictment for perjury.

The first count of the indictment charged that appellant perjured himself in a deposition on September 8, 1952 in that he falsely stated there was such a written contract by which he was to receive $100 per week as a retainer fee, $100 for each day he worked, and a participating interest in certain transactions [Clk. Tr. 3-5]. The second count of the indictment charged that appellant similarly perjured himself on October 5, 1954 at the trial of the civil action in that he again falsely stated that there was such a written contract [Clk. Tr. 5-10]. Count three charged the appellant with endeavoring to obstruct justice in that he solicited one Gladys Dutcher to perjure herhelf in a deposition in the civil action [Clk. Tr. 10-11].

Three officials of the corporation testified in the trial below that no such contract, written or oral, had ever existed [R. 49-50, 122-123, 128]. Gladys Dutcher testified that she was requested by the appellant in two conversations to falsely testify that she had seen the written contract and related papers, or so-called "credit memoranda" [R. 192-193, 199-201]. Tape recordings of these conversations were introduced into evidence [R. 327-340, 343-348, 367]. Two former secretaries of the corporation testified that appellant had requested them to testify that they had seen the contract in question [R. 163-165, 179].

Two defense witnesses testified that, in 1950, they saw what appellant contended to be a written contract and credit memoranda between Builders Control and himself [R. 239, 257]. Another witness testified that he saw papers similarly represented by appellant to be said con-

tract and memoranda in 1953 [R. 387], three years after appellant asserts they were taken from him [R. 76, 280].

The appellant testified that there was such a written contract [R. 268], and was allowed to summarize the types of activity in which he was engaged with the corporation [R. 272-277]. He was not permitted by the trial court to testify to the precise, minute details of his duties with the corporation [R. 277].

Summary of Argument.

I.

LIMITATION OF THE DEFENSE THEORY WAS NOT ERROR.

A. *Restriction of Cross-Examination Was Not Error.*

The cross-examination (1) was beyond the scope of the direct examination, (2) was on immaterial and irrelevant matters and (3) was merely supplementary to other cross-examination. Restriction of such cross-examination was proper.

B. *Exclusion of Evidence Was Not Error.*

The excluded evidence was (1) irrelevant, (2) immaterial and (3) merely cumulative to other evidence in the record. The exclusion, therefore, was proper.

C. *Requirement of Written Offer of Proof Was Not Error.*

Such procedure has been approved previously by this Court.

II.

THE COURT'S COMMENTS TO THE JURY WERE NOT ERROR.

A. *No Objection Was Made to the Comments.*

Since no objection was made during the trial, the Court's remarks must be plain error to constitute a ground for reversal.

B. *The Comments Were Not Error.*

Language similar to that used by the trial judge has been held not to be error in other cases, much less plain error.

III.

The Verdicts Were Not Contrary to the Law or to the Evidence.

A. *Count One Was Not Barred by the Statute of Limitations.*

The indictment was returned well within the five year period of limitations provided by 18 United States Code, Section 3282; further, this contention concerning the statute of limitations cannot be raised for the first time on appeal.

B. *The Two-Witness Rule of Perjury Does Not Apply to Obstruction of Justice Prosecutions.*

C. *There Was Sufficient Evidence to Sustain Conviction on Counts One and Two.*

1. Insufficiency of the evidence should not be raised for the first time on appeal.

2. Proof of appellant having knowingly committed perjury was overwhelming.

D. *There Was Sufficient Evidence to Sustain Conviction on Count Three.*

1. It is not necessary to prove that appellant endeavored to influence a "witness."

2. Mrs. Dutcher was such a "witness."

3. No variance occurred.

4. Obstruction of justice may occur in civil cases.

ARGUMENT.

I.

Limitation of the Defense Theory Was Not Error.

A. Restriction of Cross-Examination Was Not Error.

The denial by the trial court of the right to make extended cross-examination of Russell Anderson concerning the details of appellant's duties with Builders Control Service is contended to be reversible error. A typical question on cross-examination was as follows:

> "Do you recall telling Mr. Fry at about the time this trip was made by Mr. Roberts on the Valco deal, that Roberts took someone from the administration over to F. H. A., and received verbal assurance that a portion of the closing could safely occur after May 31, provided only a few days were involved?" [R. 105].

The quoted question goes far beyond the scope of direct examination, for nothing was brought out therein about appellant's duties with Builders Control Service, much less about his trips to various cities or other details of his employment [R. 47-52, 82-83]. Cross-examination outside the scope of the direct examination is properly restricted.

> *Richman Bridgman v. United States,* 183 F. 2d 750 (9th Cir. 1950).

Relevancy of this and other questions relating to the precise details of appellant's duties could have had little probative value in determining whether such duties were performed pursuant to a *written* contract. The Government freely conceded that appellant was employed by and performed duties for Builders Control Service, the sole contention of the prosecution being that appellant had

no written contract [R. 110-111, 272]. Defense counsel readily admitted that this was the sole issue [R. 41-42]. Certainly if the cross-examination was on irrelevant matters, no error was committed in restricting such cross-examination.

D'Aquino v. United States, 192 F. 2d 338, 371 (9th Cir. 1951), cert. den. 343 U. S. 935.

However, even if it be said that the matters embraced in the excluded questions had some slight tendency to prove the existence of appellant's alleged written contract, the materiality thereof was greatly outweighed by the tendency to confuse the jury and was, therefore, properly excluded. As was stated in *Bateman v. United States,* 212 F. 2d 61, 67 (9th Cir. 1954):

> "The excluded evidence would have opened up collateral issues tending to delay and unduly burden the progress of the trial."

In any event, the cross-examination was allowed to probe the general nature of appellant's work [R. 98-100]; thus, no prejudicial error resulted from limitation of further remotely material questions which were merely cumulative in effect.

Bateman v. United States, supra.

B. Exclusion of Evidence Was Not Error.

The next contention is that error was committed by the exclusion of appellant's testimony regarding his activities with Builders Control Service. The minute details of appellant's duties were quite immaterial, likely to mislead the jury as to the actual issues of the case and thus were correctly excluded under a proper exercise of the

trial court's discretion. In *Schindler v. United States,* 208 F. 2d 289 (9th Cir. 1953), it was stated, as to similarly immaterial evidence:

> "Its relevancy, if any, was too slight to render its exclusion prejudicial. The primary tendency of the excluded material was to clutter up and confuse the record, and we think the exclusionary ruling was well within the discretion of the trial judge."

Any help to the defense case that could have been gained by testimony regarding the type of work performed for Builders Control Service was fully given when the trial court allowed the general nature of each project upon which appellant worked to be explained to the jury [R. 272, 274-277]. The excluded testimony consequently was merely cumulative and was properly denied admission.

> *Wolcher v. United States,* 218 F. 2d 503, 509 (9th Cir. 1954).

Appellant now vigorously asserts that he was prejudiced by the Court's remark and ruling that "you have gone far enough, Mr. Lambeau" [R. 277]. Yet it is interesting to note that this very remark was invited by defense counsel when he stated to the Court, "I shall rely on you to stop me when you think I am going too far" [R. 272].

Appellant's half-hearted contention that defense Exhibit C was improperly denied admission into evidence is rather thoroughly answered (1) by its failure to be identified [R. 138] and (2) by the failure of the defense to reoffer the exhibit after the Court's request that it be further identified [R. 137-138].

C. Requirement of Written Offer of Proof Was Not Error.

With respect to the Court's requirement that there be a written offer of proof, it is difficult, indeed, to find prejudice to appellant resulting therefrom. The Court's request came, not during the middle of a session, but at the very end of the first day of the four-day trial [R. 150]. Further tedious argument before the jury was saved by this requested procedure, which apparently was approved by this Court in *Shreve v. United States,* 103 F. 2d 796, 807 (C. C. A. 9, 1937):

> "The Court very properly refused to permit appellants' attorney to state what he proposed to prove in the presence of the jury. Nor was it necessary to excuse the jury and delay the trial to permit the offer to be dictated to the reporter. The Court granted permission to counsel to reduce the same to writing and file it with the Clerk of the court. This was done, the contents of this paper were transcribed into the bill of exceptions and we fail to see in what manner this procedure violated any of appellants' rights."

II.

The Court's Comments to the Jury Were Not Error.

The trial commenced on January 10, 1956, and was submitted to the jury at 11:35 a. m., January 13, 1956 [R. 478]. At 5:15 p. m., January 13, the jury asked the Court the following question:

> "The Foreman: Your Honor, the jury would like the court's opinion whether it is possible to agree on two counts and have a final disagreement on a third count?
>
> The Court: As I understand the law the jury may" [R. 479].

Apparently the only coercive effect that could have been exercised by the Court was over the third count as to which the jury was in disagreement, since the allegedly coercive statement came after the above-quoted discussion. The jury returned a verdict of guilty on all three counts at 7:45 p. m., January 13, 1956 [R. 480-481].

A. No Objection Was Made to the Comments.

No objection was made by defense counsel to the Court's remarks now contended to be coercive. Appellate courts have held that the propriety of allegedly coercive remarks will not be reviewed unless objection is made thereto, on the quite valid principle that had objection been made in the Court below, the error might have been cured by the Court itself. *Campbell v. United States,* 221 Fed. 186 (C. C. A. 9, 1915), states at page 188:

> "The trial commenced September 20, 1912, ending with the return and entry of the verdict of the jury seven days later, after deliberating 48 hours. Three times they returned into court for further instructions; on the third occasion the foreman saying that the jury was unable to agree. The court, however, directed them to consider the case further. The jury having finally returned a verdict of guilty, one of the points urged on behalf of the plaintiff in error for a reversal of the judgment is that such verdict was coerced by the court. There is no basis in the record for such a contention, *especially in view of the fact that no objection was made by the defendant to the action of the court* in directing the jury to further consider the case. The defendant was evidently then willing to take the chances of a verdict in his favor, and cannot now be heard to complain of the result on that ground" (Emphasis added).

In *C. I. T. Corporation v. United States,* 150 F. 2d 85, 91 (C. C. A. 9, 1945), it was urged that the Court erred by reason of its having told the jury late Saturday night that it would not be able to re-read, as requested by the jury, an instruction until the following Monday.

> "Thereafter, the court directed the bailiff to advise the jury that it was not necessary for it to continue its deliberations throughout the night or Sunday, but that it might if desired, retire to bed and await the giving of further instructions."

Approximately 40 minutes later the jury arrived at a verdict. The Court stated:

> "No objection to the above proceedings, or to any part thereof, was made by any counsel in the case.
>
> "It is obvious that the money-lenders counsel may be deemed to have thought it of no advantage to his client to have the instruction re-read. We consider such claim to error, not excepted to, only 'far enough to see that there has been no miscarriage of justice.' Giles v. United States, 9 Cir., 144 F. 2d 860-861.
>
> * * * * * * * *
>
> "There was no reversible error in advising the juror that he would have to wait until Monday to have an instruction reread."

The experienced trial judge in the instant case gave defense counsel full opportunity to make known any objections or comments with respect to the remarks now labeled for the first time oppressive:

> "The Court: Is there any objection as to the comments of the court just now?"

Defense counsel not only made no objection, but expressed his approval as follows:

> "Mr. Lambeau: I believe it is all right" [R. 480].

It is doubtful that this Court will lend validity to this novel and somewhat ungentlemanly procedure of attacking trial court actions in which appellants concurred. A reversal of the trial court on this point must necessarily involve a utilization of Rule 52(b) Federal Rules of Criminal Procedure. Appellee leaves trustfully the application of Rule 52(b) in this case "to the good sense and experience of the judges." *Herzog v. United States,* ..... F. 2d ..... (9th Cir. 1956).

B. The Comments Were Not Error.

Clearly, no "miscarriage of justice" or "plain error" resulted from the remarks of the trial court below, as they were not error at all.

Similar remarks, even where objected to, have been made in other cases and have been held not to be error. In *Smith v. United States,* 188 F. 2d 969, 971 (9th Cir., 1951), almost identical remarks of District Judge Ben Harrison were alleged to be coercive. In that case Judge Harrison stated, *inter alia,*

> "I have instructed the bailiff to provide you with dinner if you haven't arrived at a verdict by 5:20. If you arrive at a verdict after that and I can get in the building I will be here to receive it, but I am not going to put myself in the same position that Judge Speakman is in by climbing stairs at night. If I can get an elevator I will receive your verdict up to 9:00 o'clock. If you haven't arrived at a verdict by that time, comfortable quarters will be provided for you in a hotel."

Although other remarks of the Court were made in the *Smith* case (not present herein) which inclined this Court to consider the trial judge's remarks carefully, the opinion nevertheless stated:

> "We find no substantial threat of hardship in the remarks of the Judge as to his availability to receive a verdict in the evening and as to the provision of comfortable quarters in the event that the jury had not agreed by 9:00 p. m."

In *United States v. Commerford,* 64 F. 2d 28, 30-31 (C. C. A. 2, 1933), the following statement of the trial judge was alleged to be coercive:

> "I have called you in, gentlemen, to tell you that I think you ought to make every possible effort to come to an agreement at least upon some of the charges, one or more, and to make all of the progress you can towards that end. In the event that you can not, it will be necessary that you be taken up to the hotel for the evening, and resume your deliberations in the morning."

The appellate court stated:

> "We think this instruction to the jury was eminently fair and considerate * * * All that was said and done was intended to be of assistance to the jury and to provide for their rest during the night if they failed to agree and for their further deliberation in the morning. No suggestion was made as to the verdict that the jury should return. The court's advice as to the advisability of the attempt to reach an agreement was proper. Indeed, it was the duty of the judge. Allen v. United States, 164 U. S. 492 * * *."

In *Ammerman v. United States,* 262 Fed. 124, 126 (C. C. A. 8, 1919), the following statement of the trial judge was alleged to be coercive:

> "Now, in criminal cases in this court we follow the common law practice of keeping the jurors all together until the jury have agreed; but the Marshal will endeavor to provide you a place to sleep tonight, so as not to keep you in the jury room. * * * When you go to the jury room, if you agree on a verdict this evening—it is now a little after ten o'clock—if you want to take a ballot and see if you can agree within the next half-hour, we will be ready to receive your verdict, and that will release you all. If you should not agree, we will have to keep you on hand, and you will continue to deliberate in the morning."

The appellate court stated briefly:

> "This does not approach coercion."

It similarly may be said of the instant trial court's remarks.

III.

The Verdicts Were Not Contrary to the Law or to the Evidence.

The third argument made by the appellant apparently consists of the following separate allegations:

(A) Count One of the indictment was barred by the statute of limitations.

(B) The "two-witness" rule of perjury applies to obstruction of justice prosecutions.

(C) The Government failed to prove that the appellant *knowingly* committed perjury.

(D) There was insufficient evidence to support Count Three.

A. Count One Was Not Barred by the Statute of Limitations.

18 United States Code, Section 3282, provides a five year statute of limitations for offenses committed prior to September 1, 1954, if such offenses were not barred prior to said date. Inasmuch as the instant offenses were not barred on August 31, 1954 by the three-year limitation in former Section 3282, the five year period in the new section applies thereto. Thus, Count One of the indictment, brought on October 12, 1955, was not barred.

No objection having been made at the time of trial as to the statute of limitations question, the point cannot be raised now. Rule 12(b)(2), Federal Rules of Criminal Procedure, Title 18, United States Code, and see *Caywood v. United States,* 232 F. 2d 220, 229 (9th Cir. 1956).

B. The Two-witness Rule of Perjury Does Not Apply to Obstruction of Justice Prosecutions.

The appellant's contention that the "two-witness" rule of perjury applies to obstruction of justice prosecutions is completely answered by *Catrino v. United States,* 176 F. 2d 884, 888 (C. A. 9, 1949). It was therein held that "one . . . witness, if believed, was sufficient to convict of the crime of obstruction of justice." The trial court so instructed the jury [R. 472]. Nor did the Court err in submitting the case to the jury, as the testimony of the one witness Dutcher as to appellant's solicitation of her to commit perjury [R. 180-226, 375-384] would be sufficient to convict, if believed by the jury.

C. There Was Sufficient Evidence to Sustain Conviction on Counts One and Two.

The next contention of the appellant is that the appellee did not prove beyond a reasonable doubt that the appellant did not believe in the falsity of his prior testimony.

1. Sufficiency of the Evidence Should Not Be Raised for the First Time on Appeal.

This contention involves the attacking of the sufficiency of the Government's evidence, a point which was not raised in the trial court, as no motion for judgment of acquittal, as provided by Rule 29, Federal Rules of Criminal Procedure, was made. The general principle is that one is not allowed on appeal to attack the sufficiency of the evidence presented to the trial jury unless a motion for judgment of acquittal previously has been made and the issue presented to the trial court for its determination.

Mitton v. United States, 83 F. 2d 278 (C. C. A. 9, 1936), and see cases cited therein;

Moomaw v. United States, 220 F. 2d 589 (5th Cir. 1955);

Mitchell v. United States, 221 F. 2d 554 (8th Cir. 1955), cert. den. 350 U. S. 832.

2. Proof of Appellant Having Knowingly Committed Perjury Was Overwhelming.

In order to show that no miscarriage of justice occurred in the trial, a portion of the evidence bearing upon appellant's lack of belief in the truth of the perjurious statements will be reviewed. First, however, it must be remembered that the only evidence as to appellee's actual be-

lief is not his own declaration of innocence. This point was well made in *United States v. Remington,* 191 F. 2d 246 (2d Cir. 1951), wherein it was stated, at page 249:

> ". . . [T]he peculiar rule concerning proof in perjury cases . . . requires 'direct' proof of the crime by two witnesses who testify that the accused violated his oath, or 'direct' proof by one witness plus corroborating circumstances. Since the crime of perjury consists in the contradiction between the accused's oath and his belief, the only 'direct' evidence of his guilt would seem to be his own declarations of his belief . . . But . . . it must be that the rule peculiar to perjury as to the character of the proof, means that it is the facts from which the jury may infer the accused's state of mind that must be proved by 'direct' evidence. And this view is confirmed by Chief Justice Vinson's opinion in American Communications Association v. Douds, 339 U. S. 382, 411 . . . where it is said: '. . . While objective facts may be proved directly, the state of a man's mind must be inferred from the things he says or does . . . False swearing . . . must, as in other cases where mental state is in issue, be proved by the outward manifestations of state of mind . . .'
>
> "Hence, the doctrine that perjury must be proved by the direct testimony of two witnesses or one corroborated witness means that the witnesses must testify to some 'overt act' from which the jury may 'infer' the accused's actual belief."

Thus the inquiry herein must be to determine whether there was sufficient evidence from which the jury could have inferred that the appellant did not believe his testimony in the civil action to be true, and not merely whether

the appellant has consistently stated to the world that he did not commit perjury.

The two counts of perjury involved substantially the same statement made by the appellant on two different occasions. Count One charged, in essence, that on September 8, 1952, in a deposition in the civil action brought by appellant against the Builders Control Service, appellant falsely deposed under oath that he had entered into a *written* contract with Builders Control Service in February, 1948 [Clk. Tr. 2-5]. Count Two charged, in essence, that on October 5, 1954, appellant falsely testified under oath at the time of the civil trial that Russell M. Anderson had signed the said contract on behalf of himself and Builders Control Service [Clk. Tr. 5-10].

Russell M. Anderson testified that no such contract, written or oral, was entered into [R. 49-50, 83]. In addition to this witness' testimony, the following evidence was before the jury:

1. In the said deposition of September 8, 1952, appellant stated that he had checked with Rafael R. Gonzales, Comptroller of Builders Control Service during the period in question, to see that each of the "credit memoranda" had been entered on the books of the company [R. 119-121]. Appellant had alleged that these credit memoranda had been given him at various times and in various amounts as indicia of the money owed him for his services to the corporation [R. 58-76].

Mr. Gonzales testified in the trial below that he never discussed with appellant any credit memoranda—never credited any sums to the appellant on the books of the corporation—never saw any contract pertaining to appellant, although he reviewed all contracts of the corporation in the course of his duties [R. 122-123].

2. In the same deposition, appellant stated that he had discussed his contract with Verle Fry who was the executive vice-president of Builders Control Service during the period in question. Appellant further asked him for the return of his file containing the contract [R. 126-127].

Mr. Fry testified that there was no written contract between the corporation and appellant; that appellant never asked him for the return of his contract or files; that they never discussed any credit memoranda [R. 128, 130-131]. The only discussion of any contract, according to Fry, was held five months after appellant's termination of employment by Builders Control Service at which time appellant told him that unless he was paid a substantial sum of money, he would file a law suit versus Builders Control Service for *$350,000.00* which the corporation could not stand because of the ruinous effect on its financial standing [R. 134].

3. Betty Jean Vokes, former secretary for Builders Control Service, testified that during January or February, 1951, appellant requested her several times to testify that she had seen a written contract in his file at Builders Control Service, which she had maintained [R. 168], although she had informed him that she had seen no such contract and that it would be perjury for her to so testify [R. 163-164, 166-167]. Appellant on these occasions offered her a new car or a fur coat and favorable business connections for her husband if she would testify as requested [R. 164-166, 168, 173].

4. Alice White Craver, also a former secretary of Builders Control Service, testified that she had no recollection of typing any written contract between appellant and Builders Control Service but that in 1952 appellant

had requested her to so testify and asked her to come to work for him at any salary she chose in order that she might remember more about his contract with Builders Control Service [R. 179].

5. Appellant told Mrs. Vokes and Mrs. Craver differing versions as to the disappearance of appellant's written contract [R. 164, 178]. Not only did these versions differ from each other but also from the version appellant related at the time of the trial [R. 279-281].

6. Gladys Dutcher testified that she prepared, at appellant's request and under his direction, two letters falsely stating that she had seen a written contract and credit memoranda between appellant and Builders Control Service [R. 183-185, 188, 194]. She further testified that she had told appellant she had never seen such a contract or credit memoranda [R. 194, 197, 201].

In Los Angeles, during May, 1954, appellant requested her to testify in a forthcoming deposition in the civil action to the effect that what was stated in the said two letters regarding the contract and credit memoranda was true [R. 199-201]. Tape recordings of Mrs. Dutcher's and appellant's conversations, Government's Exhibits 14, 15, 16, 17 [R. 367], were introduced in evidence. The incriminating nature of these conversations is readily apparent and the recordings completely substantiated Mrs. Dutcher's testimony [R. 327-340, 343-348]. Although appellant denied participating in such conversations as recorded [R. 352], it is interesting to note his spontaneous reaction to the playing of one of the taped conversations:

> "You mean she had a recorder hidden in my car?" [R. 349].

7. Thomas J. Lawless, originally called as a defense witness [R. 265] testified that he had seen certain papers which appellant represented to be a written contract of employment between himself and Business Control Service and various credit memos representing amounts of money owed appellant by Builders Control Service [R. 387]. However, these were shown to Lawless by appellant in 1953 [R. 387]. Mr. Lawless was certain of this fact since he did not meet appellant until 1953 [R. 265, 387, 392-393, 395, 400, 419]. Appellant on the other hand contended that his contract and credit memoranda were taken and withheld permanently from him in 1950 [R. 76, 280]. Consequently, the documents shown Lawless presumably were forgeries. It may be inferred that similar documents shown defense witnesses in 1950 [R. 239, 258] were likewise forgeries.

Further, appellant obtained an affidavit [Deft. Ex. F; Pltf. Ex. 18] from Lawless to the effect that he had so seen such a contract and credit memoranda. The date on the affidavit of his having so seen them was in obviously different type, however, and Lawless testified that such date was false and had been inserted without his knowledge [R. 265, 388, 390].

8. Appellant admitted signing Government's Exhibit No. 12, dated June 16, 1948, which contained a statement that he had not signed a contract with Builders Control Service, and that his salary was $3600 a year [R. 317-318].

9. Appellant borrowed money from Builders Control Service at the time he allegedly was being paid about $160,000 per year and repaid this loan after he had been fired, at which time the company allegedly owed him $477,-805 [R. 130, 320-321, 324-325].

The above evidence provides overwhelming proof of the falsity of the defendant's testimony that there was a written contract and credit memoranda, and unmistakably shows the lack of appellant's belief in his own assertions that such documents were in existence.

D. There Was Sufficient Evidence to Sustain Conviction on Count Three.

1. It Is Not Necessary to Prove That Appellant Endeavored to Influence a "Witness."

The contention of appellant in this respect is that it was not proved that he endeavored to influence a prospective *witness,* and thus it cannot be established that the crime of obstructing justice occurred.

First, the appellant was not *charged* with having endeavored to influence a prospective witness, but rather with having corruptly endeavored to "influence, obstruct, and impede the due administration of justice . . ." [Clk. Tr. 10-11]. This fact alone should put to rest the contention that because Mrs. Dutcher was not a "witness", the Government's proof failed. Further, Count Three clearly states an offense, as it is laid within the language of 18 United States Code, Section 1503, which reads, in pertinent part:

> "Whoever corruptly . . . endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Moreover, the cases leave no room for doubt that obstruction of justice may occur even though no witness

is sought to be corruptly influenced. This was early held in *Wilder v. United States,* 143 Fed. 443, 440 (C. C. A. 4, 1906):

> "If the strictest and narrowest possible meaning were given the word 'administration', as used in this statute, the inferences forbidden would be confined to those which obstruct or impede the judge, the jurors, counsel, the marshal, and possibly witnesses. But such obstructions are provided for in the first part of the statute, and in using the different and broader language employed in expressing the latter clause of the statute it seems clear that the intent was to embrace obstructions other than those which were dealt with in the first clause. . . . The first clause of section 5399 sufficiently provides for influencing, intimidating, or impeding witnesses (who have been summoned or otherwise designated as such) and officers of the court while actually in the discharge of their official duties. If those acts which may obstruct or impede the administration of justice, and which are not embraced within the previously used language, are held not to be embraced within the meaning of the latter clause of section 5399, Congress has wholly failed to forbid such acts, and has uselessly and confusingly twice expressed the same intent in different language."

Anderson v. United States, 215 F. 2d 84, 87-88 (6th Cir. 1954);

United States v. Polakoff, 121 F. 2d 333 (C. C. A. 2, 1941);

Bosselman v. United States, 239 Fed. 82 (C. C. A. 2, 1917).

See also:

Catrino v. United States, 176 F. 2d 884, 887 (9th Cir. 1949).

2. Mrs. Dutcher Was Such a Witness.

Second, the evidence showed that Mrs. Dutcher was to be a witness in the civil action, as appellant well knew, since he requested her to testify therein falsely for him [R. 199-200, 213-214, 326-328, 331]. The fact that she may not have been subpoenaed is immaterial since she intended to give testimony which fact appellant knew. Such circumstances make Mrs. Dutcher a "witness" within the meaning of the statute. As was succinctly held in *Walker v. United States*, 93 F. 2d 792, 795 (C. C. A. 8, 1938):

> "It was not necessary to prove that she had been subpoenaed. She was such a witness if she then intended to testify on the trial of the case then pending in the District Court."

Appellant cites as supporting his position, *Smith v. United States,* 174 Fed. 351 (C. C. A. 8, 1921). It is interesting to note, however, the holding of the Court at page 353:

> "Many, probably a majority, of all the witnesses who testify in courts of justice, do so without the service of a subpoena . . . They, however, are not less witnesses than those who testify under subpoenas. The corrupt threatening or forceful influencing or intimidation of witnesses who testify without subpoenas is not less pernicious than that of witnesses under orders of the court, and a construction which would limit the protection of this section to the latter class of witnesses is too narrow and unreasonable. The terms of the statute, the evil it was enacted to prevent, and the protection it was intended to provide, leave no doubt that under its true interpretation each of those who are subpoenaed

> to come, of those who are called and accept the call to come without subpoenas, of those who are prompted to come by their interests, *of those who expect to come, and of those who are selected and expected to come to testify* in any case in any court of the United States, falls within the class described by the terms 'any witness, in any court of the United States,' in the section under consideration" [Emphasis added].

3. No Variance Occurred.

The point might be raised in oral argument by appellant that if the evidence did show Mrs. Dutcher to be a "witness", then the indictment did not charge appellant with corruptly endeavoring to influence a witness, but rather with corruptly endeavoring to obstruct justice, and thus failure of proof or material variance occurred. Such a possible argument will be met in advance.

The proof conformed exactly to the pleading, since it was proved, as charged, that appellant sought to have Mrs. Dutcher falsely testify. The manner of pleading is quite proper and states an offense, since obstructing justice obviously occurs by the influencing of a witness. In *Anderson v. United States,* 215 F. 2d 84, 87-88 (6th Cir. 1954), the indictment similarly charged appellants with having corruptly endeavored to impede the due administration of justice by agreeing to alter the testimony of two witnesses in a pending federal case. The appellate court therein held:

> "The language of the indictment charging the offense is in strict conformity with the definition of the offense in the statute.
>
> * * * * * * * *

"It would seem easy to understand in the context what was meant by a corrupt endeavor to impede the due administration of justice. There can be no reasonable doubt that an effort to alter testimony of witnesses for a corrupt purpose would plainly be an endeavor to impede the due administration of justice. We think the implication so plain that the point need not be labored."

4. Obstruction of Justice May Occur in Civil Cases.

The next contention of appellant is contained at lines 16-18, page 16 of his brief:

"Also, until the government showed that she was or would be a witness on the issues of the perjury, there was nothing to influence or instruct (*sic*) a 'witness'."

The appellee may well misunderstand this argument, but if what is meant by it is that obstruction of justice may occur only in criminal cases, the argument is poorly founded. As was held with respect to the predecessor statute to 18 U. S. C. Section 1503, in *Wilder v. United States,* 143 Fed. 433 (C. C. A. 4, 1906):

"The contention that a violation of Section 5399, consisting of obstructing the administration of justice in a civil litigation, between private citizens in a federal court, is not an offense against the United States, need not be discussed at any length. One of the sovereign powers of the United States is to administer justice in its courts between private citizens. Obstructing such administration is an offense against the United States, in that it prevents or tends to prevent the execution of one of the powers of the government. [citing cases]."

Sneed v. United States, 298 Fed. 911, 912 (C. C. A. 5, 1924), also so held:

> "That the United States was not a party to the civil cause in which Patterson was a juror makes no difference. The justice being administered was the justice of the United States, and its purity and freedom is to be protected by federal law."

Conclusion.

The record in this case plainly shows that no error occurred in the trial below. The limitation of the defense as to the minutiae of appellant's duties with Builders Control Service was an entirely proper exercise of discretion in eliminating immaterial matters likely to confuse the jury and delay the trial. The arguments that the District Court's comments to the jury were coercive and that the evidence was insufficient to support the verdicts border on the specious when the record and the applicable law is examined.

It is a rare trial, however, in which some error, of varying degree, does not arise due to the heat of conflict or necessity for instantaneous rulings. Consequently, this Court may find that error existed in the proceedings below. Nevertheless, the clear evidence of appellant's guilt unequivocally shows that no miscarriage of justice or denial of fair trial resulted therefrom.

Respectfully submitted,

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